

**IN THE COURT OF
APPEAL AT NAIROBI
[CORAM: W. KARANJA, M'INOTI & ACHODE, JJ.A.]
CIVIL APPLICATION NO. E116 OF
2025 BETWEEN**

PATRICK MURIUKI.....APPLICANT

AND

UKOMBOZI HOLDINGS LIMITED.....RESPONDENT

(An application for injunction pending the filing and determination of an intended appeal against the Ruling and Orders of the Environment and Land Court at Thika, (Mogeni J.), delivered on 19th February, 2025

in

HCCOMM. NO. ELC MISC E002 OF 2023)

RULING OF THE COURT

1. Before this Court is a Notice of Motion dated 22nd February 2025, brought under **rule 5(2)(b)** of the **Court of Appeal Rules, 2022**. The applicant seeks that:

An order be issued pending the hearing and determination of the intended appeal, prohibiting and /or restraining the Respondent by itself, or through its agents, workers, employees, or any person acting on its behalf, from transferring, alienating, disposing of, altering land record or changing ownership of property known as L.R. No. 28318/31, (Original No. 28318/25/7), measuring approximately 3.413 Ha.

2. Aggrieved by the ruling of the Environment and Land Court, the applicant lodged a Notice of Appeal and subsequently moved this Court under **rule 5(2)(b)**, seeking to preserve the subject matter pending an intended appeal.
3. The application is premised on the grounds on its face and the supporting affidavit of Patrick Muriuki, the chairperson of Ukombozi Green Gardens Welfare Association. He deposes that the applicant failed to file an appeal from the decision of the lower court on time due to delays occasioned solely by the lower court. Further, that the learned Judge did not determine the application on merit and that she relied on reasons that were not before the court, which no party formally moved the court to address.
4. The applicant further deposes that the learned Judge dwelt on technicalities rather than substantive justice, in violation of **Article 159 of the Constitution**. That she misdirected herself in holding that without submissions, she could not make a decision on a competent application and in effect, she confirmed an ex parte judgment conferring public land on a private citizen without considering the effect of her decision on the public.
5. The application is opposed by the replying affidavit of

Jimmy Kenny Kimani, one of the directors of the

respondent sworn on 11th March 2025. He deposes that the applicant's actions have been characterized by persistent vexatious litigation, aimed at frustrating the conclusion of this matter. That he is misleading the court that he acts on behalf of, and with the authority of 700 members of Ukombozi Welfare, when some of the members clearly stated in their application for joinder that he had no such authority.

6. The respondent deposes that the applicant failed to enter appearance, or file any defence within the prescribed time in the lower court. As a result the court entered an interlocutory judgment, had the formal proof hearing and entered judgment in favour of the Respondent. The applicant belatedly entered appearance and filed an application to set aside the judgment. The application was allowed on condition that he pays Kshs. 20,000 thrown - away costs, and files a defence within the time provided by the court. In default, the impugned judgment would stand. He failed to file a defence within the time prescribed and the judgment stood.
7. The respondent deposes that two months after the ruling of the trial court, and after the judgment had been executed, the applicant filed a miscellaneous application in the Environment and Land Court at Thika, **ELC Misc Case No. E002 of 2023**, seeking leave to file appeal

out of
time, which was declined. That this application is an

afterthought having been filed two months after filing **ELC No. E002 of 2024** and the applicant did not need court proceedings to file a memorandum of appeal.

8. On the claim that the respondent may transfer the suit land to a third party, the respondent deposes that it was granted permission by the National Land Commission (NLC), to use the suit property and it was earmarked for a school. It has obtained approval for development and is in the process of constructing an elementary school. That in any case, an order for maintenance of *status quo* was entered by consent of the parties in **Thika, ELC Misc Case No. E002 of 2023**.
9. The respondent therefore, avers that: the application is incompetent; that it does not meet the threshold for granting of an injunction under rule **5(2) (b)**; and, that it amounts to an abuse of the court process.
10. The applicant filed submissions dated 18th March, 2025 through the firm of Kevin & Associates LLP Advocates, and urges that the applicant was aggrieved by the ruling of the Magistrate's court that declared the respondent the lawful proprietor of the suit property. The certified proceedings of the lower court took inordinately long to obtain, causing the applicant to file the application seeking leave to file the appeal out of time that was declined by Mogeni J.

11. The applicant submits that the suit land is public land to which the respondent has title, with alleged permission from the NLC to use it and can therefore, deal with the land in any manner it desires, before the appeal is determined. The applicant asserts that this application is not overtaken by events since there are no constructions on the land yet. That the development approval marked as *JKK-7* in the replying affidavit was issued in 2011, and the construction permit in 2021, before the institution of court proceedings.
12. The respondent's submission dated 1st April 2025 was filed through the firm of Chege & Mageto Advocates. It argues that the applicant has not met the threshold of an arguable appeal as established in the case of **Stanley Kangethe Kinyanjui v Tony Keter & Others [2013] eKLR**. Further, that the applicant has failed to demonstrate that absent injunctive relief, the appeal would be rendered nugatory as stated in **Reliance Bank Limited v Norlake Investment Limited [200] IEA 227**.
13. The respondent submits that the applicant has failed to provide any evidence of unique circumstances that would justify granting of injunctive relief under **rule 5(2)(b)**. That he has not demonstrated that any potential harm would be irreparable or incapable of compensation by way of damages as stated in **Nguruman Ltd v Jan**

Bond

Nielsen & Others [2014] eKLR. It is argued that the

subject matter can be valued and monetary compensation made if necessary.

14. The principles governing applications under **rule 5(2)(b)** are well settled. An applicant must satisfy the Court on the twin limbs that the appeal or intended appeal is arguable and that unless the orders sought are granted, the appeal would be rendered nugatory should it succeed. The two limbs are conjunctive, and failure to satisfy either is fatal to the application (**Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR**).
15. The jurisdiction of this Court under **Rule 5(2)(b)** is original, but it is not invoked in a vacuum. It is triggered only upon the filing of a valid Notice of Appeal. In **Halai & Another v Thornton & Turpin (1963) Ltd [1990] KLR 365**, the Court held that a Notice of Appeal is the document that clothes this Court with jurisdiction to entertain an application brought under **rule 5(2)(b)**. The foregoing position was reiterated in **Mae Properties Limited v Joseph Kibe & Another [2017] eKLR**.
16. We note that the Notice of Appeal relied upon by the Applicant in the present application is neither signed nor dated. In **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR**, the Supreme Court emphasized

that procedural rules are not mere technicalities, particularly where jurisdiction is concerned. The Notice of Appeal is

relied on is therefore, incapable of conferring jurisdiction on this Court to grant the orders sought.

17. On whether the intended appeal is arguable we are cognizant that an arguable appeal is one that raises at least one *bona fide* issue worthy of consideration. It is not one which must ultimately succeed, but one which ought to be argued fully before the court; one which is not frivolous. (See-**Stanley Kang'ethe Kinyanjui** [*supra*]).
18. First of all, there is no appeal before this Court. Secondly, however, the ruling challenged gave discretionary orders and appellate interference is limited to instances of misdirection or error of principle. (See- **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR**). The Applicant has not demonstrated any such error or misdirection on the part of the High court.
19. Regarding whether the intended appeal would be rendered nugatory if it succeeded, it is trite law that an appeal will not be rendered nugatory if damages would suffice as compensation. (**Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227**). It has not been demonstrated that any potential harm would be irreparable or incapable of compensation by way of damages as stated in **Nguruman Ltd** (*supra*). The subject matter can be valued and monetary

compensation made if necessary.

20. It is also not disputed that the applicant is already enjoying protective orders granted by consent of the parties, in respect of the mother title to the suit property in **Thika ELC Misc Case No. E002 of 2023**. Duplicative interim reliefs are to be discouraged. (See-**Multimedia University & Another v Professor Gitile Naituli [2014] eKLR**).

In the premise we find that the Notice of Motion dated 22nd February 2025 is not merited and is therefore, dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Nairobi this 30th day of January, 2026

W. KARANJA

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**JUDGE OF
APPEAL**

K. M'INOTI

.....
**JUDGE OF
APPEAL**

L. ACHODE

.....
**JUDGE OF
APPEAL**

*I certify that this
is a true copy of the
original **Signed**
DEPUTY REGISTRAR*